eBay Inc. v. Digital Point Solutions, Inc. et al Doc. 4

Stewart H. Foreman (CSB #61149)
Daniel T. Bernhard (CSB #104229)
FREELAND COOPER & FOREMAN LLP
150 Spear Street, Suite 1800
San Francisco, California 94105
Telephone: (415) 541-0200
Facsimile: (415) 495-4332
Email: foreman@freelandlaw.com
bernhard@freelandlaw.com

Attorneys for Defendants
Todd Dunning and Dunning Enterprise, Inc.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EBAY, INC., Plaintiff, v. DIGITAL POINT SOLUTIONS, INC., SHAWN HOGAN, KESSLER'S FLYING CIRCUS, THUNDERWOOD HOLDINGS, INC., TODD DUNNING, DUNNING ENTERPRISE, INC., BRIAN DUNNING, BRIANDUNNING.COM, and DOES 1-20, Defendants.	CASE NO.: CV-08-4052 JF **REPLY BRIEF BY TODD DUNNING AND DUNNING ENTERPRISE, INC., IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT** Date: December 12, 2008 Time: 9:00 a.m. Place: Courtroom 3, 5th Floor 280 South First Street San Jose, CA 95113

FREELAND COOPER & FOREMAN LLP
150 Spear Street, Suite 1800
San Francisco, California 94105

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San Francisco, California 94105

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150 Spear Street, Suite 1800
San Francisco, California 94105

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San Francisco, California 94105

I. INTRODUCTION

eBay's First Amended Complaint ("FAC") should be dismissed because eBay cannot state a claim under the Computer Fraud and Abuse Act, 18 U.S.C. §1030(a)(4) and (5) ("CFAA"). Once the CFAA claim fails, the RICO and California Penal Code §502 claims also fall away, leaving the FAC simply as a claim for common law fraud and related state law claims that should be litigated in a California State court. Independently, the FAC must be dismissed because venue in this Court is improper, which plaintiff has effectively admitted by its failure to provide any prima facie evidence of venue.

Kessler's Flying Circus ("KFC")[1] participated in the Affiliate Marketing Program ("AMP") offered by eBay with commission incentives to affiliates such as KFC to direct new internet users to eBay's website to engage in Revenue Actions as defined in the FAC, ¶ 19. To account for the commissions that are payable to KFC for successfully directing new users who later make purchases on eBay's website, KFC was authorized by eBay and Commission Junction, Inc. ("CJ") to issue "cookies" to internet users who visited eBay advertisements created by KFC. Those "cookies" identify KFC as the affiliate responsible for directing the new internet user to eBay when that new user engaged in a Revenue Action through eBay. CJ tracked all this activity with its computers, reported to eBay the commission payable to affiliate advertisers such as KFC, and disbursed the commissions to the affiliates based on payments from eBay under the alleged Advertiser Service Agreement. FAC, ¶ 20.

Under this business model, KFC does not access eBay's computers; internet users (with a KFC "cookie" received from visiting a KFC advertisement for eBay) access eBay's computer, and according to the FAC, receive a "cookie" from eBay. FAC, ¶ 22. If the internet user creates a

[1] This Reply Brief is submitted on behalf of defendants Todd Dunning and Dunning Enterprise, Inc. (sometimes collectively called "DEI"). At different times covered by the FAC, each of these defendants was a partner with defendant Thunderwood Holdings, Inc. in KFC. The other defendants, and particularly KFC, are separately represented in this case. However, since KFC was the participant in eBay's Affiliate Marketing Program, and not the DEI defendants directly, this brief refers to KFC in connection with eBay's allegations, although the arguments in this brief are made on behalf of the DEI defendants.

Revenue Action within certain parameters established by the AMP, the commission is generated for KFC because the "cookies" inform CJ and eBay that the internet user is attributable to KFC.

eBay alleges in the FAC that KFC was not entitled to commissions for some new customers. If an internet user allegedly did not "click" when it saw the eBay advertisement created by KFC, no commission was due to KFC when the new customer engaged in a Revenue Action. Whether or not there was a "click" or whether a "click" was even required for KFC to earn a commission for referring a new customer to eBay is at the heart of this dispute.[2] There is no dispute that all of the commissions, whether considered properly earned or not, relate to actual new internet users with a KFC "cookie" who engaged in actual Revenue Actions on eBay's website within the specified time frame.[3]

II. EBAY'S ARGUMENTS FAIL TO ESTABLISH A VIOLATION OF CFAA

A. Internet Users' Access eBay's Computer Was Authorized.

eBay argues in its Opposition Brief that its computer was accessed by an untold number of unidentified internet users acting as "unwitting" agents of the defendants to engage in fraudulent conduct in violation of CFAA, 18 U.S.C. § 1030(a)(4) and (5)(A).[4] (Opposition Brief, p. 5, lines 4-5). eBay argues that, although these internet users were initially authorized to access eBay's computer in their own right, as agents for these defendants their access to eBay's computer was unauthorized because their access resulted in payment to the defendants of an allegedly unearned commission. (Opposition Brief, p. 4, line 25).

This argument is flawed primarily because the FAC does not contain any allegations of a principal-agency relationship between KFC and this multitude of "unwitting" internet users. The

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[2] Even eBay alleges that only a portion of the commissions it paid to KFC were supposedly unrelated to a referral by the defendant, and other commissions paid by eBay to KFC were legitimately earned.

[3] eBay's Opposition Brief makes reference to an investigation commenced by the Federal Bureau of Investigation. Although this is unfortunately true, it is irrelevant for purposes of evaluating this motion to dismiss. DEI believes that eBay instigated this government investigation as part of eBay's strategy to recoup commissions now that it has terminated CJ as the manager of its AMP, and eBay is engaged in ongoing cooperation with the government in furtherance of its legal strategy against the defendants.

[4] Although not specifically alleged in the FAC, presumably eBay seeks recovery under 18 U.S.C. §1030(a)(4) in making this argument.

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FAC alleges only that "KFC caused the user's computer to access eBay's computers in an unauthorized way and/or to exceed the authorized access to eBay's computers…." FAC, ¶ 26, p. 6, lines 27-28. Moreover, the allegations in the FAC make clear that all internet users were authorized to access eBay's website to engage in a "Referred Visit" and a "Revenue Action". FAC, ¶ 18 & 19. Access to eBay's computers by internet users was initially authorized, if not encouraged, since this is the basis of eBay's business. As alleged in the FAC, every internet user that accessed eBay's computers received an eBay cookie that "identifies the site that referred the user to eBay and/or the specific affiliate responsible for directing the traffic to eBay." FAC, ¶22, p. 5, lines 23-24.

eBay tries to draw a distinction between internet users coming to its website with "cookies" resulting from a "click," and internet users coming to its website with the same "cookie," but allegedly without a previous "click". eBay essentially alleges that the former is an authorized access to its website, but the latter is unauthorized and as a result of alleged unwitting participation in KFC's alleged fraud. These allegedly unauthorized and unspecified internet users are argued to be the "unwitting" agents for defendants' unauthorized access to eBay's computer that eBay argues is sufficient to support a claim under CFAA, 18 U.S.C. §1030(a)(4) or (5).

This distinction between authorized and unauthorized visits by internet users to eBay's website to receive an eBay "cookie" is a boot-strap argument. The argument requires retroactive speculation about whether an internet user "clicked" before becoming a new eBay customer.[5] eBay's claim for violation of CFAA depends on allegedly unauthorized access that can only be defined, if at all, by a hindsight determination about whether an internet user "clicked" when seeing KFC's advertisement for eBay. Under eBay's argument, the "un-clicked" internet user becomes unauthorized after taking a Revenue Action that generates an allegedly unearned commission for eBay. At the moment the commission is generated, the prior access is argued to be unauthorized, and the internet user is labeled an agent for KFC in committing a violation of the CFAA, for which KFC should be liable. This scenario is far from the unauthorized access required by the statute.

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[5]Although the difference between an authorized and unauthorized visit even under eBay's argument is the "click", eBay does not allege how or if it can determine whether any internet user allegedly "clicked" or not.

Even when a clear principal-agent relationship exists at the outset between a party engaged in access to a computer and the second party improperly benefiting from that access, the courts have uniformly required that the first party's access be initially unauthorized[6]. It is not sufficient to re-characterize the access as unauthorized after the access. In *Shamrock Foods Company v. Gast*, 535 F. Supp. 2d 962 (Ariz. 2008), an employee's access was authorized but the information went to an unauthorized party, co-defendant Sysco Foods. Plaintiff claimed an agency relationship between the employee and Sysco Foods to allege unauthorized access by Sysco Foods. The Court dismissed the claim under CFAA, 18 U.S.C. §1030(a)(2), (4) and (5)(A)(iii), saying that Sysco Foods cannot be liable under the CFAA based on the employee's authorized access although it was for an improper purpose. *See also, American Family Meet Ins. Co. v. Rickman,* 554 F. Supp.2d 766 (W.D. Ohio 2008). The Court found that allowing a CFAA claim against Sysco Foods on these allegations of "agency principles would greatly expand federal jurisdiction." (*Id.* at 967) The Court declined to interpret the CFAA so broadly as to create liability to a third party principal for the authorized access by an agent acting with an improper purpose. Similarly, even if the Court accepts eBay's characterization of numerous "unwitting" internet users as KFC's agents, those internet users had initial authority to access eBay's computer; eBay alleges only that the access resulted in payment of an unearned commission afterwards. *See, e.g., Brett Senior & Associate., P.C. v. Fitzgerald*, 2007 U.S. Dist. LEXIS 50833 (E.D. Pa. July 13, 2007) (CFAA claim dismissed because defendant was allowed full access to the information on the plaintiff's computer even though he improperly copied and transferred plaintiff's client files to a third party), and *Black & Decker v. Smith,* 568 F. Supp. 2d. 929, 934 (W.D. Tenn. 2008). (Congress did not intend to criminalize the defendant's conduct where the defendant had authorization to access the information on the computer but then subsequently misused the data.) CFAA's "statutory purpose is to punish trespassers and hackers." *Id.*

eBay has failed to allege initial unauthorized access by the internet users allegedly acting as agents for KFC. The argument of a principal-agent relationship between KFC and the multitude of

[6] In *EF Cultural Travel B.V. v. Explorica, Inc., et al.,* 274 F.3d 577 (1st Cir. 2001), defendant engaged an internet consultant to design a computer program to conduct unlawful access.

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San Francisco, California 94105

internet users does not convert an internet user's initial authorized access into an improper one under 18 U.S.C. § 1030(a)(4) or (5) simply because of a claim that eBay eventually paid an allegedly unearned commission to KFC. As a criminal statute, the Court is required by the rule of lenity to narrowly interpret CFAA. *Shamrock Foods, supra.* at 966. eBay's FAC does not contain allegations which come within the terms of the CFAA or any authority applying it, and eBay seeks a novel and expanded view of CFAA in its FAC.

B. eBay Has Not Alleged "Damage" Under The CFAA.

CFAA § (e)(8) defines "damage" as "any impairment to the integrity or availability of data, a program, a system or information." 18 U.S.C. §1030(e)(8*)*. A violation of §1030(a)(5)(A)(i) requires "damage" intentionally caused by a "transmission of a program, information, code, or command to a protected computer." In addition to this damage, section (a)(5)(B) requires a "loss" as defined by a one-year period and $5000 in value. In the FAC, eBay relies on its allegations regarding alleged improper payment of commissions to KFC to satisfy the monetary pleading requirement of "loss," but the FAC lacks any allegations to meet the separate statutory requirement of "damage" even if *arguendo* the allegations of overpayment of commissions meet the requirement for pleading a "loss." The alleged overpayment of commissions does not satisfy both the "damage" and "loss" requirements of CFAA. The FAC does not make any allegations describing "any impairment to the integrity or availability" of anything related to eBay's computer system. In fact, the FAC does not even attempt to allege "damage" but rather alleges a vague and statutorily irrelevant "harm" as a result of defendants' conduct. FAC, ¶ 37 & 38. p. 9, lines, 17 & 24.

eBay excuses its lack of pleading "damage" by arguing in its Opposition Brief that "no authority requires eBay to plead the damage with particularity". Opposition Brief, p. 7, lines 3-4. The question is not whether "particularity" in pleading damage under the CFAA is required; the FAC lacks any pleading whatsoever regarding the statutorily required element of "damage". It is hornbook law that all elements of a claim for relief must be pleaded, and here the FAC lacks any allegations to meet the requirement of "damage" as defined in CFAA to state a claim under Section (a)(5)(A)(i).[7]

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[7] The case of *Creative Computing v. Getloaded.com LLC,* 386 F.3d 930 (9th Cir. 2004) analyzed the meaning of "damage" under CFAA along with other issues. In *Creative Computing* "damage" as defined by CFAA occurred

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eBay also tries to circumvent its pleading requirement by citing *Pacific Aerospace & Electronics, Inc. v. Taylor,* 295 F. Supp. 2d 1188 (E.D. Wash. 2003) to suggest that pleading "damage" under CFAA can be done so easily that the pleading requirement should be taken lightly by the Court. However, even *Pacific Aerospace* does not suggest that pleading the damage element of a CFAA § (a)(5)(A)(i) claim can be completely ignored as eBay has done in the FAC. Moreover, in *Garelli Wong & Associates, Inc. v. Nichols*, 551 F. Supp. 2d 704, 710 (N.D. Ill 2008) the Court said that the *Pacific Aerospace* case "does not take into account that a civil violation of CFAA requires 'impairment to the integrity or availability of data, a program, a system or information' and 'interruption and service.'"

In *Garelli Wong, supra.,* there was alleged misuse of confidential and proprietary information by the defendant, the Court nevertheless held that "integrity" as used in CFAA means impairment of the "completeness, usability or availability of data" on the plaintiff's computer. *Id.* at 709. The Court dismissed plaintiff's complaint under CFAA for failing to "sufficiently plead damage under the CFAA." *Id.* at 710.[8]

Two other important cases out of the Southern District of New York considered the question of the pleading requirements for "damage" and "loss" under CFAA in response to a motion to dismiss. The cases are *Nexans Wires S.A. v. Sark-USA, Inc., et al,* 319 F. Supp. 2d, 468 (S.D. N.Y. 2004) and *Civic Center Motors Ltd v. Mason Street Import Cars, Ltd,* 387 F. Supp. 2d, 378 (S.D. N.Y. 2005). In *Nexans,* on a motion to dismiss the Court observed that plaintiff's complaint "simply tracks the language of the statute." *Id.* at 472. The Court issued an order "directing plaintiffs to submit the facts upon which the alleged loss is based" thus converting the motion to dismiss into a summary judgment motion. The evidence offered by the plaintiff was not sufficient to satisfy the "loss" requirement of

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because of impairment to the integrity of the plaintiff's computer system caused by hacking, an examination of the plaintiff's valuable source code, and piercing a security gap in its software system. Clearly, such conduct raises the inference that the integrity of a computer's database has been impaired as required by CFAA. The FAC contains no allegations that provide a similar inference of an impairment of the integrity of eBay's computer or database.

[8] The *Garelli Wong* case also questioned the continuing viability of *Shurgard's Storage Centers, Inc. v. Safeguard Self Storage, Inc.,* 119 F. Supp. 2d, 1121 (W.D. Wash. 2000), on which eBay relies, by pointing out "that the CFAA was amended after the decision" and "is no longer compelling in light of the statutory amendments and other cases decided post-amendment." *Garelli Wong, supra. at 710.*

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CFAA because it was "unrelated to interruption of computer service" resulting in summary judgment in favor of defendants. *Id.* at 478. Similarly, the *Civic Center Motors* case said that CFAA requires "damage to, or the inoperability of, the accessed computer system" and "costs not related to computer impairment or computer damages are not compensable under the CFAA." *Id.* at 381 & 382.

Finally, eBay incorrectly argues that *Therapeutic Research Faculty v. NBTY, Inc.* 488 F. Supp. 2d 991 (E.D. Cal. 2007) provides guidance for this Court to resolve the issue of pleading "damage" under the CFAA. *Therapeutic Research* involved a limited access license to plaintiff's database purchased by one person for personal use being improperly used as a site license for multiple users to access the database and which would have cost defendant much more money. Defendant's actions revealed a weakness in the plaintiff's security and software system resulting in a "disclosure of its information" that impaired the integrity of the plaintiff's database. *Id.* at 996.

eBay's FAC does not plead similar issues. In eBay's FAC, the issue is not "impairment" of a computer or database; the issue is the interpretation and application of data provided by the "cookies" on the internet users' computer after a Revenue Action. eBay claims that the data in the internet user's "cookie" incorrectly generated a commission for KFC, whereas KFC claims the "cookie" accurately entitled it to a commission. This is a dispute over the interpretation of the data from "cookies" in relation to the AMP and its related contracts, and does not come within the scope of CFAA § 1030(a)(5)(A)(i) as a question of impairment to the integrity or availability of data on eBay's computer.

For these reasons, the motion to dismiss the claim under CFAA § (a)(4) and (5)(A)(i) must be dismissed because eBay has failed to allege that these defendants improperly accessed eBay's computers or that these defendants caused damage to eBay as defined in CFAA. Similarly, eBay's Opposition Brief raises no substantive issues in opposition to the motion to dismiss directed at eBay's claim under California Penal Code §502. The §502 claim must also be dismissed for the reasons previously argued regarding lack of "access" in the moving papers.

III. PLAINTIFF'S RICO CLAIM LACKS SUFFICIENT PLEADING OF FRAUD.

eBay's RICO claim can only be based on alleged wire fraud in connection with the payment of commissions to KFC, assuming that the CFAA claim fails. The wire fraud occurred because KFC was allegedly paid a commission for new internet users who registered and engaged in a Revenue Action through eBay, but who allegedly viewed but did not "click" on KFC's eBay advertisement. eBay claims that KFC's alleged referral of new internet users to eBay who did not "click" was fraudulent because KFC is allegedly not entitled to a commission for referring such an "un-clicked" new customer to eBay. eBay apparently claims that KFC misrepresented that all new internet users with KFC "cookies" had "clicked" at the KFC advertisement for eBay, although this is not alleged in the FAC. eBay claims that some unspecified and unidentified number of those users had not "clicked" when viewing the KFC advertisement but, although they engaged in a Revenue Action, KFC committed alleged wire fraud when their internet users had KFC "cookies" which registered a commission due.

The problem with eBay's pleading is that the FAC does not explain who, how, when, or where KFC ever represented to eBay that only "clicked" new internet users would access the eBay website with a KFC "cookie" to trigger a commission. The FAC seems to allege that both "clicked" and "un-clicked" internet users received their "cookies" by viewing a KFC advertisement promoting eBay. Both "clicked" and "un-clicked" new internet users engaged in a Revenue Action with eBay within a specified time frame to generate a commission to KFC. Yet, eBay fails to allege any facts of an agreement, a promise, a statement or anything between eBay and KFC stating that only "clicked" users would have KFC "cookies" that would claim a commission for KFC when the internet user performed a Revenue Action. eBay has argued that it has nothing to do with the Publisher Service Agreement (Exhibit A to defendants' Request for Judicial Notice) or with the Terms and Conditions (Exhibits 1-3 to the Declaration of Stewart H. Foreman in Support of the Motion to Dismiss) eBay does not even attach to the FAC the terms of the AMP that was the basis for paying any commission to KFC. Therefore, there is nothing from eBay showing an alleged misrepresentation by these defendants.

Absent such factual allegations, a RICO claim based on wire fraud fails to satisfy the pleading requirement of specificity under F. R. Civ. Proc. 9(b). A valid pleading of fraud requires an allegation of the specific misrepresentation or omission by the defendant. "[W]hen a civil RICO claim is predicated on alleged acts of mail and wire fraud, the circumstances constituting fraud must be pleaded with particularity." *Hewlett-Packard Company v. BYD:SIGN, Inc. et. al.* 2007 U.S. Dist. LEXIS 5323 (January 25, 2007), citing *Tel-Phonic Serv., Inc. v. TBS Int'l, Inc.,* 975 F.2d 1134, 1139 (5th Cir. 1992) The FAC does not contain any factual allegation of a misrepresentation by KFC thus making the pleading of RICO defective.

IV. PLAINTIFF HAS FAILED TO ESTABLISH ANY BASIS FOR VENUE IN THIS COURT.

eBay's FAC alleges both a contractual and a statutory basis for venue in this Court (FAC, ¶¶ 14-17). Its Opposition, however, discards the alleged contractual grounds for venue based on a purported forum selection clause contained in the User Agreement. Accordingly, defendants will limit their reply to § 1391(b) and (c), the only basis for venue that eBay has defended in its Opposition.

As a preliminary matter, it is eBay's burden to establish at least a prima facie case for venue in this Court. *Murphy v. Schneider Nat'l, Inc.,* 362 F.3d 1133, 1138 (9th Cir. 2004). eBay has failed to do so. Although submission of evidence is appropriate in connection with a motion under FRCP 12(b)(3), eBay has submitted no evidence whatsoever in support of its venue claim. Instead, eBay apparently relies exclusively on the FAC, and the argument in its Opposition. As such, eBay has failed to carry its burden of proof under 12(b)(3), and defendants motion should therefore be granted on that basis alone.

A. There Is No Venue Under §1391(b)(2).

Section 1391(b)(2) does not establish venue in this Court because, contrary to eBay's unsupported assertion, "the harm suffered from a defendant's actions" did not occur in this judicial district. eBay's argument is simply that because it claims the harm was "felt in the Northern District," then venue is proper here. In fact, the standard determining venue requires eBay to establish venue, not just to assert it. The proper standard under §1391(b)(2) requires that a substantial part of the events or occasions giving rise to the claim, or the property affected, must be situated in the forum. eBay alleges only that its computers were affected by "unauthorized access" and there is no allegation on which to determine how the "effect" was "substantial," as required by the statute.

Moreover, there is no record or evidence that any "harm" actually occurred in this judicial

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San Francisco, California 94105

district. Plaintiff alleges merely that "Defendants' wrongful actions were specifically directed at and intended to affect eBay in San Jose…." (FAC, ¶17) But the FAC is devoid of any details or specific allegations beyond this generality. eBay never explains how or in what manner it suffered harm in this forum beyond claiming it paid commissions. Plaintiff asks the Court to infer that defendants' alleged actions constitute some judicially cognizable "harm" sufficient to satisfy venue requirements; they do not.

In fact, the only specific allegations eBay makes concerning defendants' actions and specific conduct all involve events outside of this judicial district. eBay acknowledges that defendants' activities were all organized under and a part of the AMP (FAC ¶19), and that eBay relied exclusively on CJ to administer that program. (FAC ¶20). eBay also admits that CJ handled the financial dealings with defendants, including payment of all fees to defendants. (FAC ¶20). The only allegation of direct contact with eBay is defendants' alleged "access" of eBay's computers. (FAC, ¶ 34). As the FAC alleges, the chief link between defendants and eBay was CJ at all relevant times. There is no harm alleged adequate to create venue based on defendants' purported acts. eBay's failure to provide any evidence in support of its assertion of venue leaves essential questions unanswered, and eBay's failure to make any prima facie case for venue requires that this action be dismissed.

B. There is No Venue for the Corporate Defendants Under §§ 1391(b)(1) and 1391(c).

eBay argues that under §§1391(b)(1) and 1391(c) this Court's personal jurisdiction over the corporate defendants supports eBay's assertion of venue. But plaintiff again fails to establish any basis for venue over these defendants. No defendant is a resident of this judicial district, and eBay does not argue otherwise. Defendants are all residents of the Central District, or elsewhere in southern California.

In the Ninth Circuit, a three part test is the basis for establishing venue for a non-resident corporate defendant: (1) the nonresident defendant must do some act or consummate some transaction within the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum such that the benefits and protections of the forum's laws are invoked; (2) the claim must arise out of or result from the nonresident's forum-related activities; and (3) exercise of jurisdiction must be reasonable. *Myers v. The Bennett Law Offices*, 238 F.3d 1068,

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1075 (9th Cir. 2001); *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1484 (9th Cir. 1993). eBay offers no facts or even allegations to satisfy these three prongs.

1. Defendants did Nothing to Avail Themselves of the Privilege of Conducting Activities in this Forum.

In tort actions, Courts have followed an "effects" test to satisfy the first prong of "purposeful availment." *Dole Food Company, Inc. v. Watts, et al*, 303 F.3d 1104, 1111 (9th Cir. 2002). "To meet the effects test, the defendant must have (1) committed or intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered in the forum state. *Panavision Int'l LLP v. Toeppen,* 141 F.3d 1316, 1321 (9th Cir. 1998). *See also, Bancroft & Masters, Inc. v. Augusta National, Inc.,* 223 F.3d 1082, 1087 (9th Cir. 2000). Nothing in eBay's allegations meet these factors, in particular eBay has alleged no facts showing that defendants' acts were "expressly aimed" at this forum, and even if they were, that the "brunt of the harm" resulting was suffered here. It is undisputed that defendants activities arose from on their association with the AMP. That program was based on a contract entered into by defendants with CJ, that defendants operated under, and defendants were paid under. All of these activities occurred in the Central District, or elsewhere in southern California. It is also undisputed that defendants' chief contact with eBay was through CJ, eBay's agent. The only activity that eBay accuses defendants of in the Northern District is "accessing" eBay's computers, but plaintiff does not even allege where those computers are located.

2. Ebay's Claims Do Not Arise from Defendants' Forum-Related Activities.

According to the FAC, defendants' wrongdoing consists of "stuffing cookies", which practice allegedly involved Internet users throughout the United Stares and internationally. Based on the allegations in the FAC, defendants had virtually no activities related to this forum. To the extent that defendants' activities had any specific geographical location, it was at defendants' places of operations in Southern California. In fact, the FAC, ¶ 28, alleges that defendants avoided any alleged "cookie stuffing" in "San Jose, California."

Plaintiff has failed to allege what harm, if any, occurred in this forum. Under the "but-for" test used by the Ninth Circuit in tort actions, but for defendants alleged acts at their places of business in

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southern California, eBay would not have suffered any injury. *See, Ziegler v. Indian River County*, et al, 64 F. 3d 470, 474 (9th Cir, 1995)(but for defendants' forum-related activities, claims would not have arisen). The harm that eBay is suing on was not committed by defendants in this forum; it was committed (according to the FAC) by defendants' actions in the Central District.

3. The Exercise of Venue in this District is not Reasonable.

eBay has failed to carry its burden to establish venue under the first two prongs of the Ninth Circuit's standard analysis. It likewise cannot prevail on the third prong, which requires balancing seven factors to determine whether the Court's exercise of its discretion in finding venue is reasonable: (a) the extent of the defendant's personal interjection into California; (b) Defendant's burden to defend on California; (c) the conflict with the sovereignty of defendant's state; (d) California's interest in deciding the dispute; (e) judicial efficiency in resolving the dispute; (f) the importance of California to plaintiff's interest in convenient and effective relief; and (g) the existence of an alternative forum. *Core-Vent Corp. v. Nobel Industries, AB,* 11 F 3d 1482, 1487-88 (9th Cir. 1993); *Ziegler v. Indian River County, et. al*. 64 F 2d 470, 475 (9th Cir. 1995).

a. Defendants Did Not Interject Themselves Into the Forum.

Defendants did not interject themselves into this judicial district, and eBay does not allege otherwise. eBay's lawsuit is based on the claim that defendants' improperly interjected themselves into computer systems all over the world, resulting in a fraud on eBay. There is nothing forum-related about defendants' alleged conduct. In fact, this forum was avoided by the defendants as alleged in FAC ¶ 28.

b. Defendants Never Accepted the Burden of Defending in this Judicial District.

Once again, there is no evidence that defendants accepted the burden of defending in this judicial district. In fact, the evidence is to the contrary. The only forum selection clause that arguably governs these defendants specifies that they are subject to the state court located in Orange County.[9]

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[9] The Publisher Service Agreement that defendants entered into as part of the AMP, a program that eBay admits it directed CJ to administer for eBay, specifies that the exclusive forum for any actions related to the PSA, "shall be in the State Court, and, to extent that federal courts have exclusive jurisdiction, in Los Angeles…." Forum selection clauses are presumed valid and binding. *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 855 F.2d 509, 512 (9th Cir.

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If defendants accepted the burden of defending in any forum, it was in the Orange County Superior Court, where they are presently defending "cookie-stuffing" allegations.

c. There is No Conflict with Sovereignty.

This factor appears irrelevant to the analysis of litigating in this forum or the Central District

d. This Forum's Interest in Deciding this Dispute.

While this forum has an interest in protecting the rights of a resident, eBay, that interest is not superior to the Central District's interest in resolving disputes involving several of its residents, and in overseeing the conduct of those residents.

e. Judicial Efficiency

It is more efficient to have this dispute resolved in the forum where litigation has already commenced involving many of these same parties and issues .

f. This Forum is Not Important to Plaintiff's Convenient and Effective Relief.

eBay has presented no evidence or argument that establishes why or how this judicial district is important, or even necessary, to its efforts to obtain convenient and effective relief.

g. There Is an Existing Alternative Forum.

There exists a ready and convenient alternative forum in the United States District Court for the Central District of California.

C. Transfer of this Lawsuit to the United States District Court for the Central District is Appropriate

Based on the convenience of the parties and the witnesses, transfer of this lawsuit is required. Courts in the Ninth Circuit look to the following factors to determine whether transfer is appropriate: (1) plaintiff's choice of forum; (2) convenience of the parties; (3) convenience of the witnesses; (4) access to the evidence; (5) familiarity of each forum with applicable law; (6) feasibility of consolidation of other claims; (7) the local interest in the controversy; and (8) relative court congestion and time to trial in each forum. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F 2d

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1988). CJ, and eBay, are bound by this agreement, along with defendants, and venue is proper only in the Central District.

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834, 843 (9th Cir. 1986); *The Carolina Casualty Company v. Data Broadcasting Corp. et al*, 158 F. Supp. 2d 1044, 1048 (N.D. Cal. 2001). To the extent that these factors are applicable to this action, they weigh heavily in favor of transferring this lawsuit to the Central District of California.

A plaintiff's choice of forum is not dispositive, especially where, as here, other factors weigh heavily against litigation in a forum. *Williams v. Bowman*, 157 F. Supp 2d. 1103, 1106 (N.D. Cal. 2001). It is undisputed that all of defendants, and their employees, agents and representatives are located in the Central District, or elsewhere in southern California. No defendant has any direct contact with the Northern District. Defendants' contacts were all with eBay's agent, CJ, in the Central District.

All of the witnesses known to defendants reside in the Central District, or elsewhere in southern California. eBay has not identified a single witness in this forum, and merely asks the Court to assume that such exist. Such speculation does not meet eBay's burden of proof. All of the obvious evidence in this dispute is located in the Central District or elsewhere in southern California. All defendants conducted their operations there; all of their employees and their computers are also located there.

Because there is a pending lawsuit involving similar parties and claims, there is a possibility of consolidating that action with this lawsuit in the Central District. The factors pertaining to familiarity with applicable law, court congestion and local interest in the outcome of the action do not appear to be relevant here.

D. This Court's Abstention Is Appropriate

eBay's insistence that its lawsuit here, and its agent's lawsuit in Orange County, are completely unrelated is contradicted by the simple facts. eBay's claim that the State Court case "has no bearing on eBay's case" and that "none of the damages sought by eBay overlap with the damages sought by CJ" (Opposition, at 3) is demonstrably false. CJ is trying to recover a fee it paid to defendants that eBay refused to reimburse to CJ on the grounds that defendants engaged in improper cookie stuffing, in breach of their AMP agreement. While there are a range of different damages theories asserted in the two lawsuits, eBay admits that the alleged conduct at issue overlaps: "CJ's claim for defendant's breach appears to be based at least partially on cookie stuffing by the CJ defendants." (Opposition, at

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San Francisco, California 94105

20). Alleged "cookie" stuffing is at the heart of CJ's lawsuit, just as it is the center of eBay's claims in this Court.

There is a very real danger of inconsistent findings and even verdicts in these two lawsuits. With the trial of the Orange County action set for March, 2009, issues litigated and decided there may impact directly the proceedings in this forum if the Court does not abstain from this lawsuit.

V. CONCLUSION

For these reasons, these defendants respectfully request that the Court dismiss the CFAA and RICO claims as failing to state facts to allege a claim for relief. Accordingly, the Court lacks subject matter jurisdiction, and the entire case should be dismissed. In the alternative, the Court should dismiss this case because it is improperly filed in this district.

Dated: November 26, 2008

FREELAND COOPER & FOREMAN LLP

By: ____________/s/____________________
STEWART H. FOREMAN
Attorneys for Defendants
Todd Dunning and Dunning Enterprise, Inc.